Steven M. Wells
Steven M. Wells, P.C.
1000 Second Ave.
Suite 3140
Seattle, WA 98101
(206)436-0630
(206)682-3746 fax
steve@alaskalegaldefense.com

Attorney for Defendant

In the Superior Court for the State of Washington
King County at Seattle

State of Washington, Plaintiff, v. Elizabeth J. Hokoana, Defendant.	Case No. 17-C-02989-7SEA Trial Brief

Elizabeth Hokoana, by and through her undersigned counsel of record, hereby submits the following brief in anticipation of trial.

1. Overview

Ms. Hokoana has been charged with assault in the first degree for allegedly shooting Mr. Joshua Dukes. She has given proper notice to the State that she is asserting self defense and/or defense of others. She has given notice that, should she prevail, she will be seeking reimbursement for reasonable costs pursuant to RCW §9A.16.110(2).

This event occurred on January 20, 2017, at the University of Washington campus at an event hosted by the U.W. College Republicans. The College Republicans invited Milo Yiannopoulos to speak. Mr. Yiannopoulos is a controversial speaker and a number of people, including members of Antifa and Black Bloc, protested the event. The controversial speaker, the Trump Inauguration earlier that day, the protests, the surfeit of videos that appeared on social media, and the shooting ensured that this case was subject to intense media scrutiny. The parties anticipate such scrutiny may continue at trial.

2. Witnesses

Ms. Hokoana has provided the State with a list of her potential witnesses, including expert witnesses. Absent unexpected circumstances, Ms. Hokoana's list of witnesses and Mr. Hokoana's list of witnesses are largely co-extensive. We will be presenting thirteen (13) civilian witnesses, fourteen (14) law enforcement officers, two (2) hybrid fact-expert witnesses, two (2) expert witnesses, and potentially one (1) investigator. Ms. Hokoana has not decided whether she would testify.

3. Jury Instructions

Ms. Hokoana has submitted an initial list of proposed jury instructions. She reserves the right to supplement, amend, or withdraw instructions based upon the presentation of the State's case and the development of evidence.

4. Evidentiary Issues

There are several evidentiary issues that need to be addressed prior to jury selection and opening arguments.

4.1 Testimony of Joshua Dukes

Mr. Dukes was allegedly shot by Ms. Hokoana. Ms. Hokana has asserted self-defense and defense of others. From the very beginning of the investigation, Mr. Dukes has been, at best, extremely reluctant to cooperate with the prosecution of this case. Mr. Dukes has made it known through social media postings that he has no intention of complying with any subpoenas or assisting the prosecution. Mr. Dukes retained counsel to represent his wishes to both the State and the defense.

Ms. Hokoana and Mr. Hokoana attempted to interview Mr. Dukes but Mr. Dukes would not agree to an interview. The Hokoanas then tried to depose Mr. Dukes, but through counsel he opposed the deposition. The court ordered Mr. Dukes to attend a deposition and a deposition was scheduled for Wednesday, June 5, 2019, at 8:30 a.m. at the courthouse. At that hearing, the State announced on the record that it was proceeding to trial whether Mr. Dukes testified or not. After that hearing, Mr. Dukes' counsel informed the parties that Mr. Dukes again had no intention of appearing.

Seeking to avoid unnecessary expenses, the parties stipulated that if Mr. Dukes did indeed appear a simple audio recording would comply with the court's order. The parties presented this stipulation to the court and it was granted. To no one's surprise, Mr. Dukes did not appear for the deposition on June 5, 2019. After Mr. Dukes failed to appear, the State informed counsel for the Hokoanas that it would not seek a material witness warrant, nor would the State be calling Mr. Dukes.

Since Mr. Dukes will be conspicuously absent from this trial, his statements to law enforcement or about the shooting should be excluded from evidence. Most fundamentally, introducing Mr. Dukes' statements would violate Ms. Hokoana's right of confrontation under the Sixth Amendment of the U.S. Constitution and Art. 1, §22 of the Washington Constitution. Both constitutions guarantee that Ms. Hokoana has the right to make her accuser sit in open court, look her in the eye and testify about what happened. Allowing the State to present evidence of Mr. Dukes' statements would eviscerate that right.

While the above is likely not disputed, the potential wrinkle comes if the State changes its mind and seeks a material witness warrant or otherwise brings Mr. Dukes in to testify. Ms. Hokoana has relied upon the State's assertions in open court that it will proceed to trial without Mr. Dukes. Those assertions have profoundly affected Ms. Hokoana's trial strategy and preparation. Should the State change course after the jury is sworn, Ms. Hokoana will suffer profound prejudice and will be forced to decide whether to continue the trial after having committed to a particular trial strategy or seek a mis-trial. Such a choice would likely bar re-trial since the State would have forced Ms. Hokoana to seek the mistrial but this court can avoid that trap by ordering that Mr. Dukes' statements about the shooting and the Milo Yianapolous event are excluded from evidence.

The State has announced it is proceeding to trial without Mr. Dukes. The State should not be able to de-rail Ms. Hokoana's case after the jury is sworn by revoking its decision after Ms. Hokoana has relied to her detriment upon the State's announced intentions. This court should exclude Mr. Dukes' statements about that evening from evidence in this case.

4.2 Authentication of Mr. Dukes' Social Media

Prior to the Milo Yiannopoulos event, Mr. Dukes made numerous social media postings regarding his views of the Milo event and his approval, and even advocacy, of the use of violence against attendees of the Milo event. Depending upon how evidence proceeds in this case, such evidence could be admissible under several theories. Such a posting could be evidence of Mr. Dukes' state of mind under WRE 803. It could be evidence of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident under WRE 404(b). Such evidence could be required under Ms. Hokoana's rights of due process, compulsory process, and confrontation as enumerated under the Sixth Amendment of the U.S. Constitution and Art. 1, §22 of the Washington constitution.

Prior to any determination of admissibility, though, the admitting party must establish an adequate foundation that the posts are authentic. The prosecution has agreed to stipulate that Mr. Dukes' social media postings are authentic if the defense agrees that Mr. Hokoana's social media postings are authentic. Ms. Hokoana would stipulate that Mr. Hokoana's social media postings are authentic, although she does not stipulate to their admissibility for reasons demonstrated below.

Should this court deem it necessary, Ms. Hokoana is prepared to make a proffer outside the presence of the jury demonstrating why those posts can be authenticated as Mr. Dukes'. Whatever the path to authentication, this court should deem Mr. Dukes' social media postings authenticated and not use lack of foundation as a barrier to admissibility.

4.3 Mr. Marc Hokoana's Social Media Postings

Prior to attending the Milo event, Mr. Marc Hokoana communicated with a friend via FaceBook Messenger. He indicated that if Antifa got violent, he was prepared to defend himself. The State seeks to introduce these postings as evidence of Mr. Hokoana's state of mind, particularly that he went to the Milo event intending to commit violence against Antifa members. Upon information and belief, the State also seeks to introduce those statements against Ms. Elizabeth Hokoana as statements of a co-conspirator.

Ms. Hokoana objects to the introduction of those statements in the State's case-in-chief. First, Mr. and Ms. Hokoana have not been charged for any form of conspiracy. The elements of conspiracy are clear and well-known: an agreement between two or more persons to engage in conduct and a substantial step toward such an agreement.[1] It is equally well-

[1] RCWA § 9A.28.040(1).

known that statements of a co-conspirator are not hearsay.[2] The Hokoanas have been charged as accomplices, but accomplices are not co-conspirators, nor does the evidence code exclude statements of accomplices from the hearsay definition.

The statements that the State seeks to introduce were sent by Mr. Marc Hokoana to a friend via FaceBook Messenger. They were not posted on Mr. Hokoana's public FaceBook page. There is no evidence that Ms. Hokoana ever saw them, read them or even knew of their existence. The State has produced no evidence to suggest a conspiracy as opposed to being accomplices, nor did the State seek to charge the Hokoanas as co-conspirators. Should the court consider admitting those statements as co-conspirator statements, Ms. Hokoana would ask that the State make a proffer outside the jury's presence to establish what proof it would present to prove that the Hokoanas were conspiring together.

The second reason against introducing those statements in the State's case in chief is *Bruton*.[3] *Bruton* prohibits the admission of the statements of a non-testifying defendant against a co-defendant. It is not clear whether Mr. Marc Hokoana will testify. Indeed, Washington's Court of Appeals, Third Division, ruled today that a defendant's testimony is not necessary to establish his subjective fear to raise a self defense case.[4]

This court should not allow admission of Mr. Marc Hokoana's FaceBook Messenger messages to be admitted during the State's case-in-chief.

4.4 Ms. Hokoana's Statements to the University of Washington Police

After learning that Mr. Dukes had been shot, Mr. and Mrs. Hokoana returned to the U.W. Police Department. They stated that they wished to report a self defense shooting and asked to speak to an attorney. They made no further statements. U.W. Police initially

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[2] WRE 801(d)(2)(v).
[3] *Bruton v. United States*, 391 U.S. 123 (1968).
[4] *State v. Tullar*, ___ Wash. App. 2d ___, ___ P.3d ___, No. 35956-III (Div. 3 2019)(attached hereto)(holding that testimony of independent witnesses may establish sufficient evidentiary basis to justify giving a self defense instruction).

thought Mr. Hokoana was the shooter and he was briefly detained, although Ms. Hokoana did make similar statements.

Should the State seek to introduce those statements, Ms. Hokoana would ask this court hold a hearing pursuant to W.R.Cr.Pr. 3.5 if for no other reason than to establish the foundation for introducing those statements and ensuring that the statements were freely and voluntarily made and were not the product of coercion or intimidation.

The State may object to the introduction of Ms. Hokoana's statement, particularly during its case-in-chief. Even if the court rules that the statements are not admissible in the State's case in chief, Ms. Hokoana's rights of due process, confrontation, and her compulsory process right to present a defense demand that she be allowed to prove that the State was put on notice early in this matter that Ms. Hokoana would be asserting self defense.[5]

4.5 The State's Video Expert

Both parties have retained video experts to help review, collate and organize the plethora of videos and photos that were generated during this event. The State's anticipated expert, Mr. Grant Fredericks, will testify about his opinion regarding the chronological order of videos taken from a multitude of different sources throughout the evening. That opinion is within the appropriate grounds for an expert opinion.

However, the State's expert goes further. The State's expert has opined that he cannot see a knife in Mr. Dukes' hand in the photos and videos that are anticipated to be introduced. This opinion is not within the appropriate grounds for an expert opinion for two reasons.

First, this opinion is not relevant. The issue is not whether Mr. Dukes actually had a knife or not. The issue is whether Ms. Hokoana reasonably believed that Mr. Dukes had a knife. Washington law is quite clear that a person not need be in "actual danger" to use force in defense of self or others. Rather, a person must "reasonably believe[] he was in danger of

[5] See *Kyles v. Whitley*, 415 U.S. 419 (1995)(

bodily harm."[6] Even if Mr. Dukes did not have a knife, Ms. Hokoana is not guilty if she reasonably believed that Mr. Dukes possessed a knife or a dangerous weapon or otherwise posed a risk of assault to herself of others.

Second, this opinion is not based upon "scientific, technical, or other specialized knowledge"[7] that will assist the jury. Rather, the State's expert just looked at the videos or photos and would be testifying about what he sees. The jury can look at those photos and videos and determine for themselves whether the images show that Mr. Dukes possessed a knife. Having an expert testify that Mr. Dukes possessed a knife runs the risk of the jury being unduly influenced by expert testimony by either placing too much importance on whether Mr. Dukes had a knife or by using an expert's opinion in lieu of their own analysis of the evidence.

Other courts have excluded expert opinions when such opinions have been based upon factors within the common sense and experience of the average juror. The Main Supreme Court reversed a manslaughter conviction when the trial court improperly admitted the medical examiner's opinion that the death was a homicide.[8] The deceedent died from head wounds after striking his head on a cement floor. The state asserted the deceedent was pushed while the defense argued he fell on his own. The medical examiner agreed that there was no affirmative medical evidence either way. That is, medical speaking, the decent could have fallen or have been pushed. The medical examiner testified that in her opinion, the deceedent was pushed.

The Maine Supreme Court rejected that testimony because it did not come from her training and experience. Instead, it was based exclusively upon her discussions with law enforcement officers. As such, it was not expert testimony as courts use that term but was instead a judgment of the police investigation and credibility.[9] The Maine Supreme Court specifically stated:

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[6] *State v. Theroff*, 95 Wash.2d 385, 390, 622 P.2d 1240, 1244 (1980)(citing *State v. Ladiges*, 66 Wash.2d 273, 401 P.2d 977 (1965) and *State v. Miller*, 141 Wash. 104, 105, 250 P.645 (1926).
[7] WRE 702.
[8] *State v. Vining*, 645 A.2d 20 (Maine 1994).
[9] *Ibid* at 21.

> It is appropriate for the medical examiner to testify, as she did, that severe force was applied. It is another thing entirely, however, to testify that, although the physical evidence was insufficient for her to distinguish whether [the decedent] fell or was pushed, the police investigators had convinced her that [his] death was a homicide. That is not a medical opinion.[10]

The Supreme Court of Hawaii reached a similar decision on similar facts. Citing Haw.R.Evid. 702 and 704 and Commentary, which are based on the federal rules just like Alaska's, the Court found that the expert opinion in that case essentially told "the jury what result to reach."[11]

New Jersey has a similar case. In *State v. Jamerson*,[12] the defendant was on trial for vehicular manslaughter. The issue was whether the accident that caused the death was intentional or accidental. The medical examiner determined the death was a homicide because the crash was not an accident. The New Jersey Supreme Court found that under N.J.R.E. 702, the expert's testimony exceeded the expert's expertise. The court noted that, "A forensic pathologist's testimony is therefore restricted to describing the mechanics of death."[13] The court excluded the medical examiner's opinion because the expert's training as a forensic pathologist did not give the expert any better training or expertise than the jury. As such, the conviction was reversed.

Washington courts have excluded testimony when no special skill or knowledge was needed to form an opinion. In *State v. Smissaert*,[14] the defendant was charged with felony murder and burglary. The defense wished to introduce expert testimony that the defendant was too intoxicated to form the requisite intent. The Court rejected such testimony, finding that numerous lay witnesses had testified that the defendant was intoxicated and the jurors could reach their own decisions about the level of intoxication.

Since the jurors can review the evidence for themselves and they do not need "scientific, technical, or other specialized knowledge" to determine what those photos and

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[10] *Ibid.*
[11] *State v. Pinero*, 778 P.2d 704, 712 (Hawaii 1989).
[12] 708 A.2d 1183 (N.J. 1998).
[13] *Ibid* at 1194.
[14] 41 Wash. App. 813, 706 P.2d 647 (Div. 1 1985).

videos depiet, this eourt should preelude Mr. Frederieks from testifying about his opinion about what the photos depiet.

4.6 Criminal Convietions

Pursuant to WRE 609, Ms. Hokoana would seek to limit introduetion of the eriminal convietions of witnesses in this matter. Upon information and belief, no witness has been convieted of a felony, nor has any witness been convieted of any erime involving dishonesty. Mr. Tyler Elliott has been eharged with providing a false name to law enforeement, but he has not been convieted.[15] Ms. Hokoana would seek to exelude evidenee of those eharges sinee Mr. Elliott at this point has not been convieted and, indeed, appears to have a viable defense.

Should either party seek to introduee evidenee of a conviction, Ms. Hokoana would ask that the requesting party make its request outside the presenee of the jury so the eourt ean determine whether sueh a conviction should be admissible.

4.7 Evidenee That the University of Washington Prohibits Firearm Possession

It is undisputed that at all relevant times, the University of Washington prohibits possession of firearms on its eampus.[16] Failure to eomply with this seetion is a violation, akin to jay-walking or littering. Indeed, University of Washington poliee apparently do not issue eitations for this offense.

During defense counsel's interview of Lieutenant Sehultz of the University of Washington Polieе Department, Lt. Sehultz stated that one of his jobs is to keep firearms seized from people who bring them on eampus. He stated that as part of U.W. polieе work, offieers sometimes eneounter persons earrying firearms pursuant to a eoneealed earry permit, mueh like Ms. Hokoana. He stated that the poliey in sueh instanees is to ask the person to

[15] Upon information and belief, it appears that this is likely just a case of an officer mis-hearing what Mr. Elliott said.
[16] W.A.C. 478-124-020(2)(e).

leave the campus or to take possession of the firearm. That person can come to the U.W. police station and later claim the weapon. Only if a person refuses to relinquish a weapon do the police institute further corrective measures, such as issuing a trespass notice for a specified period of time.

Lt. Schultz also agreed that the University campus does not post notices regarding the University's policies about weapons. The only place where notices about weapons policies are prominently placed are in the Medical Center. Even today, Lt. Schultz stated that the University provides notice only during large events and that using 'sandwich' boards.

In discussions with Lt. Schultz and Ms. Barbosa when she was counsel for the State, Ms. Hokoana stated that she knew students were prohibited from carrying firearms on the campus, but she did not know that visitors were likewise prohibited. She told them that she had researched online and indeed, after this event, the University's policy about carrying firearms was not clearly disclosed. It is not in the RCW and an average citizen would not think to review the Administrative Code.

If Ms. Hokoana would not have faced any realistic chance of being issued a citation, and if she was otherwise carrying a firearm pursuant to a lawfully issued concealed carry permit, evidence that the University prohibits carrying of firearms is not relevant to whether Ms. Hokoana's use of force was justified or not. Further, evidence that the University prohibits the carrying of firearms would be unduly prejudicial against Ms. Hokoana. Therefore, this court should exclude evidence regarding the University's prohibition against carrying firearms.

4.8 Testimony Regarding Fear of Reprisal

Some witnesses may wish to indicate that they fear reprisal for testifying for or against a particular side in this case. The Hokoanas have certainly made no threats against anyone to testify or for failing to testify, so no such testimony is necessary to establish the elements

of the crimes the State has charged. Such testimony by other witnesses would merely unduly prejudice the jury on irrelevant grounds and should be excluded.

4.9 The Hokoana's participation in Guns Across America

As part of its investigation, the State uncovered evidence that the Hokoanas attended a Guns Across America rally in Olympia a few years before the Milo event. The purpose of the event was to show state legislatures the popular support for reforming and streamlining gun laws and allowing greater access to concealed carry. The Hokoanas were pictured at the event.

There is no indication that the event was unlawful or advocated violence. The purpose of the event was to peacefully urge reformation of state gun laws. That the Hokoanas took part in this event does not make it more or less likely that their use of force against Mr. Dukes was unlawful. Indeed, there is some evidence suggesting that persons holding concealed carry permits commit proportionately fewer crimes than even sworn law enforcement officers.[17]

Ms. Hokoana understands that not everyone agrees with these studies and admits that they are controversial. But the fact that reasonable people cannot decide how to interpret readily accessible data on this issue just shows how irrelevant it is that the Hokoanas attended the Guns Across America rally a few years ago.

Not only is the subject irrelevant, it is potentially prejudicial. Guns rank with abortion, immigration, religion and politics as a tremendously socially divisive topic. There will be enough controversy in this case because Ms. Hokoana had a carry permit and was attending a Milo Yiannopoulos event. The evidence that the Hokoanas attended this particular rally

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[17] See https://crimeresearch.org/2015/02/comparing-conviction-rates-between-police-and-concealed-carry-permit-holders/ (analyzing studies showing that in Florida, between 1987 and 2011, .008% of concealed carry holders had their license revoked for commission of crimes while .017% of law enforcement officers faced weapons violations.)

adds nothing hut controversy and prejudice. The court should exclude evidence that the Hokoanas attended the Guns Across America rally.

4.10 Evidence that the University of Washington Barred Ms. Hokoana from Returning To Campus

After this event, the University of Washington notified Ms. Hokoana that she did not have permission to be on University grounds. The parties did stipulate that the Hokoanas could go to Red Square with their counsel under the eyes of Lt. Schultz to prepare for the case. Otherwise, the Hokoanas have followed that order.

This order, issued after these events, does not make any material fact more or less likely. It is utterly irrelevant to these proceedings and this court should exclude evidence that Ms. Hokoana was banned from coming onto University property.

4.11 Statements Attributing Motive to Ms. Hokoana

This event generated a great deal of controversy and publicity. After the event, both sides of the political spectrum rushed to either defend or castigate the Hokoanas. Numerous organizations and individuals issued statements regarding the Hokoanas. Political opponents labeled them 'white supremacists', Nazis or KKK sympathizers. There is not one shred of evidence that any of those labels apply to the Hokoanas.

This court should prohibit witnesses from opining about the Hokoanas motives or seeking to affiliate them with controversial groups or parties, such as the Proud Boys or Patriot Prayer, because there is no evidence that they are involved or affiliated with those groups or similar groups. Such opinions would be false and extremely prejudicial.

There may he cases where such testimony is admissible, hut this is not one of them. Ms. Hokoana would request this court exclude such evidence and instruct the State to admonish

its witnesses that such opinions are prohibited from evidence so that no witness, inadvertently or otherwise, makes such an inflammatory false allegation.

4.12 Calling Mr. Dukes a "Victim"

Ms. Hokoana objects to any reference to Mr. Dukes as a "victim". The word "victim" connotes that the person had nothing to do with the circumstances leading to the adverse effects. Think of a cancer "victim", or an earthquake "victim." That connotation is not appropriate when Ms. Hokoana has asserted her right to defend another. The appropriate term for Mr. Dukes should be "injured party."

Pre-Trial Publicity

This case received a great deal of pre-trial publicity, not only in Seattle but throughout the country. It is undoubted that some of the jurors will have been exposed to some of that publicity and it may affect their perceptions of evidence. To address the effects of pre-trial publicity, the parties have agreed upon a proposed jury questionnaire. The questionnaire is attached hereto as an exhibit.

Counsel for Ms. Hokoana has been involved in two cases that received a great deal of press attention and the practice in those cases could be helpful here. Ms. Hokoana proposes that this court disseminate the jury questionnaire and then gather responses. The questionnaire is short and should not take longer than 5 minutes to complete. The parties could then review the responses and divide potential jurors into three groups: those who have been exposed to pre-trial publicity and have formed an opinion about guilt or innocence; those who have been exposed to pre-trial publicity and do not have an opinion about guilt or innocent; and those who have not been exposed to pre-trial publicity.

The parties can stipulate to excusal for cause for those jurors who have already formed an opinion. For those potential jurors who have been exposed to pre-trial publicity but have not formed an opinion, the parties would seek individual voir dire solely on the issue of pre-

trial publicity. This allows the parties to determine what the potential juror has heard and whether that would affect that juror's suitability. So, as an example, if a juror claims to have heard that Ms. Hokoana confessed to some other matter unrelated to this event (no such testimony is expected in any way), the potential juror's recitation of the pre-trial publicity will not taint other potential jurors. The parties can then challenge for cause any juror who has been exposed to pre-trial publicity. Those jurors remaining would be grouped with the jurors who have not been exposed to pre-trial publicity and the parties could conduct general voir dire as in a typical case.

DATED this 12 day of June, 2019, at Seattle, WA.

Steven M. Wells, PC
Attorneys for Defendant

By: _____
Steven M. Wells
WA Bar No. 42800

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via mail / hand delivery / facsimile / email this 7th day of June, 2010 on:

King County Prosecuting Attorney
ATTN: Mr. Raam Wong
W554 King County Courthouse
516 Third Ave
Seattle, WA 98104-362
Counsel for the State

Ms. Kimberly Gordon
1000 Second Ave.
Suite 3140
Seattle, WA 98101
Counsel for Mr. Marc Hokoana

SMW
_____
Steven M. Wells, PC

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. BRANDON THOMAS TULLAR, Appellant.	)	No. 35956-5-III PUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Each party is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support the theory. To determine whether the evidence is sufficient, trial courts must view the evidence in the light most favorable to the party who requests the instruction. This ensures that juries are the arbiters of factual disputes.

Here, the trial court denied Brandon Tullar his requested self-defense instruction because he did not testify that he feared his opponent would badly beat him. But the law allows Tullar to establish his subjective fear by circumstantial evidence through the testimony of others. Because Tullar's evidence sufficiently established a self-defense theory, the trial court erred in not giving Tullar's requested instruction. We reverse

Tullar's conviction and order a new trial.

FACTS

On December 31, 2017, correctional officer Timothy Millward was making his welfare checks on inmates at the Okanogan County jail when he came across Johnathan Cook's cell. Officer Millward saw Cook facing away from the door, and Officer Millward could tell something was wrong. Officer Millward asked Cook to turn around, and he noticed bruising and a laceration on Cook's face, a bloodstained shirt, and bruising on his ear. Officer Millward took Cook to get medical attention. Cook was diagnosed with a fractured nose and a fractured left eye socket.

Sergeant Eugene Davis was dispatched to investigate the assault. Cook reported that he was in his cell around 10:00 p.m., when Brandon Tullar entered it and punched him in the back of the head. As Cook turned around, Tullar elbowed him in the left eye. This caused Cook to lose his vision and fall. Cook tried to defend himself by covering his face, but Tullar continued to hit him and knee him in the nose, stomach, and chest. The assault lasted about three minutes.

Sergeant Davis then spoke with Tullar. Tullar denied he fought Cook. Sergeant Davis noticed marks on Tullar's hands and his elbow, as well as red marks on his neck.

The State charged Tullar with assault in the second degree. Tullar asserted the defenses of self-defense and mutual combat.

At trial, the State called Officer Millward, Sergeant Davis, and Cook. Their testimonies were generally consistent with the facts related above. After Cook testified, the State rested.

Tullar withdrew his claim of self-defense and proceeded with the defense of mutual combat. He then called two fellow inmates who witnessed the fight. According to both inmates, Cook and Tullar were arguing, and Cook challenged Tullar to a fight. Cook and Tullar then went upstairs to Cook's cell, with Tullar going first. Once inside the cell, Cook hit Tullar from behind. Cook put Tullar in a chokehold,[1] but Tullar escaped. They exchanged punches until Cook gave up.

During the jury instruction conference, the State argued that public policy precluded inmates charged with assault to assert the defense of mutual combat. The trial court agreed and declined to give a mutual combat instruction. Tullar then requested a self-defense instruction. He argued the instruction was warranted because there was testimony that Cook threw the first punch. The State argued that a self-defense

[1] This detail is consistent with Sergeant Davis's observation that Tullar had red marks on his neck.

instruction was not warranted because Tullar did not testify to his state of mind. The State further argued that persons other than Tullar could not testify about Tullar's state of mind because that would be conjecture. The trial court noted that self-defense requires a subjective standard and because Tullar had not testified about his subjective fear, it would not give the instruction on self-defense. The trial court also noted that self-defense was inconsistent with mutual combat.

The jury found Tullar guilty of assault in the second degree. Tullar timely appealed.

ANALYSIS

Tullar raises three issues on appeal, including whether the trial court erred by not instructing the jury on self-defense. Because that issue is dispositive, we do not address the other two.

SELF-DEFENSE INSTRUCTION

Tullar contends the trial court erred by not instructing the jury on self-defense. He argues the instruction was warranted based on the testimonies of his two fellow inmates. We agree.

The standard of review for a trial court's refusal to give a jury instruction depends on the basis of the trial court's decision: If the decision was based on a factual

determination, it is reviewed for an abuse of discretion; if the decision was based on a legal conclusion, it is reviewed de novo. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). Here, the trial court refused to instruct the jury on self-defense because Tullar did not testify about his subjective fear.[2] Whether a defendant must testify about his subjective fear to receive a self-defense instruction is a question of law, which we review de novo.[3]

Each side is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). In order to raise self-defense before the jury, a defendant bears the initial burden of producing some evidence that tends to prove the assault occurred in circumstances amounting to self-defense. *See State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). While the threshold burden of production for a self-defense instruction is low, it is not nonexistent. *Id.* For the jury to be instructed on self-defense, the

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[2] The trial court also believed that self-defense was inconsistent with mutual combat. We generally agree. But the terms of mutual combat did not include being sucker punched. Tullar's evidence indicates he was attacked by Cook. When attacked, a person, including a prisoner, is entitled to avoid further injury by using reasonable force. RCW 9A.16.020(3); *see also State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000) (prisoner was entitled to self-defense instruction against corrections officer).

[3] Had the trial court refused to instruct on self-defense because the State was prejudiced due to Tullar's brief withdrawal of his self-defense theory, our review would be "abuse of discretion." But this was not the basis for the trial court's refusal.

defendant must produce some evidence regarding the statutory elements of that defense. *Id.* "In determining whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must view the evidence in the light most favorable to the defendant." *State v. O'Dell*, 183 Wn.2d 680, 687-88, 358 P.3d 359 (2015).

In Washington, the use of force is lawful when used by a person about to be injured, provided that the force used is not more than necessary. RCW 9A.16.020(3). Because self-defense is a lawful act, it negates the mental state and the "unlawful force" elements of second degree assault. *State v. Acosta*, 101 Wn.2d 612, 616-18, 683 P.2d 1069 (1984).

Although self-defense has both subjective and objective components, neither requires testimony from the defendant. Evidence of self-defense may come "from 'whatever source' and . . . the evidence does not need to be the defendant's own testimony." *State v. Walker*, 164 Wn. App. 724, 729 n.5, 265 P.3d 191 (2011) (quoting *State v. Jordan*, 158 Wn. App. 297, 301 n.6, 241 P.3d 464 (2010), *aff'd*, 180 Wn.2d 456, 325 P.3d 181 (2014)), *adhered to on remand*, *State v. Walker*, No. 39420-1-II (Wash. Ct. App. Feb. 25, 2013) (unpublished), http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=39420 1MAJ.

Here, Tullar's witnesses testified that Cook hit Tullar from behind and then put him in a chokehold. From this, a trier of fact could infer that Tullar reasonably feared that if he did not fight back, he would be rendered unconscious. Tullar's witnesses testified that Tullar stopped fighting when Cook gave up. From this, a trier of fact could find that Tullar used no more force than necessary. A self-defense instruction was warranted to let the finder of fact determine whether it believed Cook or whether it believed Tullar's witnesses.

A court's refusal to instruct the jury on a party's defense theory when it is supported by sufficient evidence is reversible if the failure to instruct is prejudicial. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). At trial, Tullar did not contest that he fought Cook and that he caused Cook's injuries. Tullar's only argument for acquittal was that he lawfully defended himself. The trial court's decision to not instruct the jury on self-defense virtually guaranteed Tullar's conviction. The outcome of this case turns on whose version of events the jury believes and the question of lawful self-defense. The trial court's refusal to give a self-defense instruction thus prejudiced Tullar.

Reversed.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Pennell, J.